

Gerrymandering and Judicial Review in Malaysia

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For the last two years, the government of the state of Selangor in Malaysia has attempted to navigate its way through the Malaysian court system; questioning the constitutionality of re-delineation of electoral boundaries in the state by the Malaysian Elections Commission. This would appear seemingly straightforward as a constitutional question to be determined by the courts vis-à-vis judicial review. The reality, however, is much more bleak. It appears that the Election Commission's actions can remain largely unchallenged, not only through ouster clauses in particularized elections legislation, but also through the unwillingness of the judiciary to recognize the importance of the constitutional question relating to fair and equitable electoral management.

A Single-Party Rule and Redrawing Boundaries: What's the Issue?

Malaysia has had a single-party rule since its independence in 1957. By way of background, the ruling political party in Malaysia is Barisan Nasional (The National Front), a center-right coalition of eleven political parties; it is the largest party in the Malaysian Parliament, ruling the country since our independence. With political ideologies that centered on 'ketuanan Melayu' (Malay preeminence), social conservatism, and increasing intolerance towards minority communities, which has intensified in the last ten years, Barisan Nasional (BN) appeared to be (in my opinion) no longer a stable and viable leader to govern Malaysia. However, even with a more liberal, but none less corrupt opposition coalition as the alternative, Malaysians are caught between a rock and a hard place.

The strife between political rivals in Malaysia is more deeply grounded in the facets of its multi-racial communities. This characteristic, the multi-culturalist dynamics in Malaysia, that was once its reigning pride and joy, has, for some time now, been the subject of internal strife, pitting religion and race against each other. In light of the 1MDB international scandal allegedly involving the Malaysian Prime Minister and several other high-ranking officials in government, faith in the present government by a number of factions (particularly amongst the large numbers of urban youth) is at an all time low.

But I write now, not of election controversies over billboards placed by opposition parties that openly criticized the ruling political party in government. I write not of alleged corruption, the 1MDB Scandal, in which the current Malaysian government's investment arm, 1MDB, was alleged to have been involved in corruption and siphoning of public funds in the amount of approximately US\$1.3 billion. I write not of blatant name-calling and finger pointing, and the stifling of freedom of speech by an overly paranoid government.

I write of the weakness of the Malaysian Elections Commission (EC), which makes its actions unquestionable, its role a travesty of bias, its actions protected by legislative ouster clauses, and the exclusion of judicial review from its jurisdiction. The deplorable side of

political campaigning and electoral management has reared its ugly head numerous times; and the EC, tasked with the responsibility of maintaining fair and equitable elections, has proven itself to be nothing more than a toothless tiger, scurrying in the shadows of the ruling party.

The EC was, in fact, embroiled in a legal action brought by the Selangor state government since 2016, on its on-going re-delineation process of constituent maps, fighting off allegations that it was in collusion with the ruling government for the forthcoming national general elections. The claim brought by the Selangor state government in the courts was that the EC's re-delineation process was unconstitutional in nature and in violation of Malaysia's Federal Constitution, for the following reasons: first, that there was mal-apportionment and gerrymandering in certain constituencies; secondly, that the names of at least 100,000 voters were missing because the EC did not rely on the latest, most updated electoral roll to conduct the re-delineation exercise; and thirdly, that the EC's notice to redraw the electoral boundaries did not contain adequate information. This, in fact, was also not the first time that the EC had been subject to misgivings; a coalition of non-governmental organizations named Bersih, called for clean and fair elections and a reform of the electoral process, and threw the EC under scrutiny from 2011.

The EC's recent decision to hold the general elections on the 9th of May 2018, falling on a weekday (Wednesday), was also subject to some hue and cry. The Malaysian diaspora, particularly living in countries like Singapore and Thailand (where postal voting during the elections was not an available option) would likely face some difficulty in returning home to the country mid-week, to vote in their respective constituencies. A more concerning issue was the EC's recent decision to again redraw the election boundaries in the state of Selangor, a Pakatan Harapan (opposition party) stronghold, weeks ahead of the dissolution of Parliament. The Malaysian Parliament passed on the new electoral maps on 28th March 2018; the effect of the re-delineated boundaries is an imbalance in constituencies, prompting allegations of mal-apportionment and gerrymandering. (The decision to pass on the new electoral boundaries was made notwithstanding the pending legal action by the Selangor state government before the courts).

The Constitutional Challenge: Wither Away Judicial Review?

In February this year, the Selangor state government finally met its defeat in the aforesaid legal action before the courts. At the Court of Appeal, the claim was dismissed on the grounds that the EC's re-delineation exercise could not be challenged by way of judicial review; although the court also acknowledged that the EC failed to provide rebuttal evidence to some of the grounds raised by the Selangor state government. The Selangor state government thereafter filed an application before the Federal Court, the apex court of Malaysia. At the Federal Court, the three-judge bench upheld the decision that "EC recommendations for a re-delineation exercise in parliamentary and state constituencies was not amendable to judicial review." A statement made by the EC chairman following this decision lauded the *"recognition involving the separation of powers between the executive, legislative and judiciary branches in the country."* This is laughable, to say the least: the exclusion of judicial review to act as a check-and-balance for executive acts, is, in itself, a

contravention of the purpose of separation of powers. In any case, scholars believe that this issue is likely to become moot, as the judiciary has shown itself unwilling to interfere in the legality of executive acts in the past, and judicial review in Malaysia vis-à-vis Article 121 of the Federal Constitution has been considerably tamed since the Malaysian constitutional crisis in 1988. The significance of the effect of Article 121 is that the judiciary is subject to “*such jurisdiction and powers as may be conferred by or under federal law*.” This, in itself, is a flawed concept that would hamper an independent judiciary from exercising its judicial powers.

The bitter taste that has been left in the mouth following the Federal Court’s decision prompts one to ask the question: if the EC’s recommendations for a re-delineation exercise results in the inevitable outcome of increasing one political party’s opportunity for success over another, or if the EC had failed to provide rebuttal evidence to the claims made by the Selangor state government (as had been acknowledged by the Court of Appeal), how does it then become possible to exclude judicial review from this equation? Logic, and certainly, common law rules of equity must prevail, particularly so when the allegations of *ultra vires* by a public body, impact the citizens at large. In Malaysia, Section 96 of the Court of Judicature Act of 1964 requires that “*legal or constitutional questions of public importance*” must be framed before the apex court may hear the case. Would an imbalance in constituencies in the electoral process therefore not be regarded as a “*constitutional question of public importance*”? Furthermore, Section 9A of the Malaysian Elections Act 1958 remains a highly controversial legislative provision, because it emboldens the EC with absolute power in ultimately framing and controlling the electoral roll: “*...the electoral roll shall be deemed to be final and binding and shall not be questioned or appealed against in, or reviewed, quashed or set aside by, any court.*” The effect of this provision means that the electoral roll relied upon cannot be challenged at all; in substance, even if there was any elements of fraud or irregularity. If the electoral roll cannot be challenged by judicial review at all, and may thereby lead to unfair outcomes in the subsequent elections, I fail to understand why this is not regarded as a “*constitutional question of public importance*.”

It is recognized that judicial review is concerned with the legality of the action, and not the merits of the case; but the position taken by the Court of Appeal, and the Federal Court, has failed to appreciate why the constitutionality of the EC’s actions was raised in the first place, and why, above all, judicial review cannot be excluded from this purview: it seems simple to glean that the inability to challenge the EC would be a violation of not only the principle of separation of powers, but also the fundamental right of citizens to participate in the democratic processes of their country, in accordance with the guarantees under the Federal Constitution.

There is no reason why matters relating to electoral processes cannot be subject to judicial review. In Bush v Gore in the United States, the Supreme Court held that a conflict regarding the manual recounting of votes in Florida under its laws, to meet “safe harbor” deadlines, was unconstitutional under the equal protection clause of the Fourteenth Amendment, because it would significantly affect the outcomes of either a Republican or a Democrat victory. In the United Kingdom, with the exception of Northern Ireland, a complex

set of legislative acts govern elections and electoral processes, as well as statutory instruments, regulations and orders; these were made in response to “allegations and confirmed cases of electoral fraud in previous elections.”

Malaysia: Parallel to my Hungarian Home?

In my adopted home in Hungary, some Hungarian scholars are as pessimistic of the role of its Constitutional Court, as I am regarding the role of judicial review in Malaysia. It alarms me, that the judiciary as an important constitutional organ in a country has lost its will to counter-veil the role of political power and its ability to influence a democracy.

Almost two weeks ago, I followed the news of Hungary's elections in Budapest, waiting with bated breath; wanting to believe in my heart that liberal democracy is not dead. But I watched my Hungarian friends and colleagues collapse into disenchantment, as the ruling political party in Hungary, Fidesz, won a resounding constitutional supermajority in the elections, retaining its political foothold in the country. In one fell swoop, I felt deeply for my fellow Hungarians; and also for myself, for my Malaysia.

With Malaysia's upcoming general elections on the 9th of May 2018 and a political environment similar to Hungary's, this empathy is made much more acute because the depth of emotions stirred within, seemed to me, the tolling death knell of the sanctity of the rule of law, of safeguarded constitutional values and principles, and a belief in modern democracy. I cannot help but feel a sense of foreboding and unsettling familiarity reaching its deft fingers into my concerns for Malaysia's upcoming general elections.

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